Servomation Corporation *and* Pennsylvania Federation of Teachers. Case 4-CA-12411

21 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 6 May 1983 Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

As a threshold matter, the judge found that the instant dispute is inappropriate for deferral to the parties' contractual grievance-arbitration procedure pursuant to the Board's *Collyer*[1] doctrine. The judge further found that the Respondent violated Section 8(a)(5) and (1) by reducing the hours of work of a substantial number of employees without informing the Union of its intention to do so during contract negotiations and without affording the Union an opportunity to bargain over the reduction. For the reasons set forth below, we find that deferral is appropriate under *Collyer* and its progeny. We therefore express no views on the merits of the instant dispute.

The complaint alleges that the Respondent reduced a number of employees' work hours without informing the Union of its intention to do so during contract negotiations and without affording the Union an opportunity to bargain over the matter. In its defense, the Respondent argues that the unilateral reduction of work hours is authorized by the management rights clause in the parties' collective-bargaining agreement, which provides:

> Subject to the specific limitations, modifications, and delegations of authority contained in this Agreement, the Company shall retain the rights to exercise the customary functions of management in the operation of its business including, but not limited to, the right to hire, promote, transfer, and assign work, to increase or decrease the work force, to determine products to be handled, *to change work schedules and hours of work*, to establish reasonable rules and regulations. [Emphasis added.]

The Respondent also avers that the Union agreed to eliminate a clause from an earlier collective-bargaining agreement that limited the Respondent's ability to reduce employees' hours. Finally, the Respondent asserts that the grievance-arbitration clause of the collective-bargaining agreement[2] encompasses the instant dispute and that it is willing to submit the dispute to binding arbitration.

The judge found deferral to the grievance-arbitration process inappropriate on two grounds. First, she found that the Respondent "has expressed no willingness" to waive the expired contractual time limitations for the invocation of the grievance-arbitration procedure. Second, she found that "[t]he issues presented here do not involve any issues of contract interpretation." We find these reasons unpersuasive.

As for the first ground, the judge herself states that the Respondent moved for deferral under *Collyer* at the hearing. The Respondent reiterated its deferral claim in its posthearing brief, its exceptions, and its brief to the Board. Such actions indicate a sufficient willingness to waive the contractual time limitations. See *Roy Robinson Chevrolet*, 228 NLRB 828 (1977).

Nor can we agree with the judge's conclusion that the issues presented here do not involve any issues of contract interpretation. As noted above, the complaint alleges that the Respondent unilaterally reduced a number of employees' work hours in violation of Section 8(a)(5). The Respondent's initial defense is that the collective-bargaining agreement enables it unilaterally "to change work schedules and hours of work." Thus, on its face, the instant case is a classic candidate for deferral to arbitration because a determination of the Respondent's authority unilaterally "to change work schedules and hours of work" *would necessarily resolve the merits of the unfair labor practice alleged in the complaint, and the issues in dispute are cognizable under the parties' grievance-arbitration procedure. Roy Robinson Chevrolet*, supra.

The General Counsel, supporting the judge's decision, disputes the apparent linkage between the unfair labor practice pleaded and the applicable contract provision the Respondent cites in its defense. The General Counsel argues that the Respondent cannot avail itself of the contract provision because, in effect, the Respondent undermined

[1] *Collyer Insulated Wire*, 192 NLRB 837 (1971).

[2] That clause establishes a four-step procedure culminating in binding arbitration. It provides that "[a] grievance is a complaint that there has been a violation, misinterpretation, misapplication, inequitable or otherwise improper application of any of the provisions of this Agreement."

the collective-bargaining process by bargaining generally in bad faith and engaging in a knowing and willful effort to deceive and mislead the Union during negotiations.

The Board has held that deferral is inappropriate in situations where the complaint alleges that the party seeking deferral has acted in total disregard of its collective-bargaining obligations,[3] subverted the collective-bargaining or grievance process,[4] or demonstrated enmity to employees' exercise of Section 7 rights.[5] There are, however, no such allegations in the instant complaint. Thus, "[t]he contract and its meaning in present circumstances lie at the center of this dispute,"[6] as framed by the complaint and the Respondent's defense.[7] In addition, the General Counsel has failed to demonstrate that collective bargaining in general or the grievance-arbitration procedure in particular has been subverted to the extent that resort to the grievance-arbitration procedure would be unpromising or futile.[8] Accordingly, we find that the issues raised in the instant dispute should be deferred to the grievance-arbitration provisions of the collective-bargaining agreement.

ORDER

The complaint is dismissed, provided that:

Jurisdiction of this proceeding is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision and Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

[3] *Communications Workers Local 1190 (Western Electric)*, 204 NLRB 782, 784 (1973).

[4] *Joseph T. Ryerson & Sons*, 199 NLRB 461, 462 (1972).

[5] See *Collyer*, 192 NLRB at 842.

[6] Id.

[7] The maintenance of a meaningful and effective deferral policy, pursuant to our expressed commitment in *United Technologies*, 268 NLRB 557 (1984), requires that the initial deferral decision under *Collyer* be made on the basis of the complaint, the Respondent's defense, and the applicable contract provisions. Thus, it serves few, if any, of *Collyer's* stated objectives to make a decision regarding deferral that is based on evidence and legal theories that are outside the specifically pleaded complaint allegations. In short, the Board and its judges ought not first decide the case and then determine whether deferral is appropriate.

[8] *United Technologies*, supra, fn. 21.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me on August 16 and 17, 1982, pursuant to a charge filed on September 17, 1981, and a complaint issued on December 24, 1981. The complaint alleges that Respondent Servomation Corporation violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by reducing the number of hours of work of a substantial number of employees in a unit represented by the Pennsylvania Federation of Teachers (the Union), notwithstanding that, during collective-bargaining negotiations, Respondent failed to inform the Union of its intention to reduce these employees' hours of work and to give the Union an opportunity to bargain with respect to this matter.

On the basis of the entire record, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel and by Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation which is engaged in providing industrial and institutional food services with a facility in Lancaster, Pennsylvania. During the year preceding the issuance of the complaint, Respondent purchased, in the course of such operations, products valued in excess of $50,000 directly from points outside Pennsylvania. I find that, as Respondent concedes, it is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

For a number of years, the Union[1] has been the exclusive representative of a bargaining unit consisting essentially of employees working in connection with the school lunch program of the Pottsgrove School District, Pottstown, Pennsylvania. Prior to 1979, the school lunch program for this public school system was under the direct operation and control of the Pottsgrove board of education. In 1979, in an effort to reduce costs, the board of education decided to solicit bids from private food service contractors for the operation of the lunch program. In the spring of 1979, the operation was awarded to Respondent. Either this contract or a succeeding contract expired by its terms at the end of the 1980–1981 school year. Under the initial and all subsequent contracts with the school board, Respondent was not entitled to receive any profit from the operation of the school lunch program. Rather, Respondent was entitled to receive its expenses plus a flat fee. If this total amount was less than total revenues, Respondent was required to return the difference to the school board. If total reve-

[1] The relevant collective-bargaining agreements state that they were signed by the Pottstown Federation of Teachers, Local 2156, American Federation of Teachers, AFL-CIO. The Pottsgrove Federation of Teachers is a local affiliate of the Union. The pleadings and briefs disregard any distinctions between these organizations.

nues were insufficient to cover expenses plus the flat fee, the school board was to reimburse Respondent for the difference. The school board has always had to make such payments to Respondent, largely because about 25 percent of the meals are served to children who are entitled to free or below-cost meals by reason of low family income.

On receiving the school-lunch contract in 1979, Respondent recognized the Union as the bargaining representative of the cafeteria employees and in July 1979 entered into negotiations looking toward a collective-bargaining agreement. The Union's bargaining agreement with the school board (which agreement was in effect between July 1, 1978, and June 30, 1979) contained a provision that hours would not be reduced during the effective period of the contract, contained no provision which dealt with the subject of layoffs, and contained no management-rights provision. During negotiations, Respondent proposed the deletion of the provision regarding no reduction in hours, the addition of a clause setting forth a system for determining who would be included in a layoff if one took place, and the addition of a management rights clause. When the Union asked Respondent's reasons for wanting the clauses regarding hours reduction and layoffs, Respondent explained that it planned to centralize in one school much of the cooking operation for the elementary and intermediate schools, each of which had previously had a kitchen. Further, at the Union's request, Respondent provided the Union with a copy of the staffing proposal which Respondent had included in its successful bid to the school board. This staffing proposal set forth an intention to have a particular number of employees, and to have a number of the employees work shorter hours than previously. The Union asked Respondent for a contractual guarantee that hours and the number of employees would not be cut below the level set forth in the staffing proposal. Respondent stated that it would not do so because it had no control over the level of student participation in the lunch program, and because sometimes an entire school will be closed during the school year owing to structural problems or fire.[2] The bargaining agreement, as finally executed, did not include the previous provision regarding no reduction in hours; provided (in substance) that layoffs would be effected in reverse order of seniority if the retained senior employees were qualified to do the work; and contained a management-rights clause which was virtually identical to the clause, set forth in full, infra, included in the 1981–1983 agreement directly involved here. Also, the 1979–1981 contract contained a modified union-shop clause, checkoff provisions, and a grievance and arbitration clause. During the negotiations which led up to this contract, Respondent's representatives included Robert Grosh Jr., Respondent's area dining service manager. The Union's representatives included Clyde Dry, who is its treasurer, and who is a public high school teacher in another unit represented by the Union.

At the beginning of the 1979–1980 school year, and after the execution of this agreement, the daily work schedules of the unit employees who worked in the elementary schools were reduced from their former daily 6-3/4 level to 2-1/2 hours a day. In other schools, some employees' hours were reduced from their former daily 6-hour level to 4 or 5 hours a day. These reductions remained in effect for the entire 1979–1980 school year.

During the 1980–1981 school year, hours were increased at the West School owing to the 1980 addition of another school with another cafeteria. The employees at this school included the wife of union negotiator Clyde Dry. One employee in the high school covered by the lunch program was assigned to work 1 hour less than usual on November 12, 1980. Four employees in lower schools covered by the program were assigned to work .3 hour to .5 hour less than usual on November 14, 1980. Three employees in an elementary school covered by the program were assigned to work 1.5 hours less than usual on May 14, 1981, and .25 hour less than usual on May 20. Eight employees in the high school covered by the lunch program were assigned to work from .5 to 1.4 fewer hours than usual on June 10, 1981; seven of these were assigned to work from .5 to 1.4 fewer hours than usual on the following day, June 11. All of these changes in schedule were for the particular day only. Grosh testimonially attributed these changes partly to unspecified changes in operation to improve quality; and partly to a reduced participation level, perhaps owing at least partly to class trips. Three of the employees whose schedules were thus changed in May or June 1981 participated in the negotiations leading to the 1981–1983 contract.[3]

My findings as to the hours reductions in November 1980, May 1981, and June 1981 are based largely on Respondent's Exhibits 8 and 9, compiled from Respondent's records by food service director Ellen A. Thomson, and received in evidence without objection. Grosh stated in his October 1981 prehearing affidavit that hours reductions were also effected in February 1981. At the August 1982 hearing, he testified that Thomson had told him that she thought she had made such reductions, but that he had found his affidavit to be incorrect "just recently when we had her check the records." However, Thomson was unable to recall requests from Grosh for such information about September 1981 or October 1981, and testified that he receives such information on a current basis in the ordinary course of business. Although Grosh testified that there "could" also have been hours reductions during the 1979–1980 school year, the absence of supporting records and his efforts to overstate the number of changes lead me to infer that the reductions during the effective period of the 1979–1981 bargaining agreement were limited to those set forth in the preceding paragraph.

[2] The level of participation is affected by both the school enrollment and the percentage of students who choose to participate. Also, on occasion, entire classes may be absent from school because of school-organized field trips. About 75 percent of all meals are paid for at the cash register on the day the meal is purchased. The remaining meals are paid for by means of a ticket which is obtained in advance and, ordinarily, is valid for 1 week. Almost all the meals obtained by ticket are meals which are obtained free or at a reduced price.

[3] Namely, elementary school employee Hildenbrand and high school employees Czeiner and Wilhelm.

In February 1981, because of an increase in the amount charged to students for their lunches, the number of lunch participants decreased. In the spring of 1981, Respondent recommended to the school board, without telling the Union about this recommendation, that the total budget of hours be reduced. The school board rejected this recommendation, on the ground that the students' unhappiness over the price increase might be aggravated by the attitude of lunchroom employees made unhappy by a reduction in their hours of work. The Union was not advised of the school board's decision.

In February 1981, Respondent put into final form its proposal to the school board for the 1981–1982 school year, including the proposed staffing and the proposed number of hours for each school. The proposal did not contemplate a reduction in staffing but, because of the decrease in student lunch participation following the price increases a few weeks earlier, did contemplate a significant reduction in hours. Grosh testified that the Union did not ask him whether this finalized proposal contemplated a reduction in hours, and he did not advise the Union of the proposed reduction. The record fails to show whether the Union was aware that this proposal had been finalized, or even that it was in the process of being drafted. On May 26, 1981, Respondent gave this proposal to the school board. Respondent did not advise the Union that a proposal was being submitted or that it called for an hours reduction. Grosh testified that he had no way of knowing whether the school board would act on Respondent's recommendation, and that he did not tell the Union about it because "I was never asked, and I didn't feel I had any obligation." Grosh testified that on an undisclosed date before August 14, and inferentially on or after June 25, 1981, he had told the Union that Respondent had no contract with the school board for the forthcoming school year.

B. *The Negotiations Which Led to Execution of the 1981–1983 Collective-Bargaining Agreement*

1. The Union's initial proposals

Inferentially because one or both parties gave timely notice of a desire to terminate or modify the 1979–1981 collective-bargaining agreement, that agreement expired by its terms on August 15, 1981. About June 18, 1981,[4] the union bargaining committee prepared written contract proposals to be submitted to Respondent. Among the proposals then drawn up was a proposal for a guarantee of at least 2-1/2 hours' work a day. The Union drew up this proposal because the employees on the bargaining committee knew that in the past, some employees had had their hours reduced below that level. Also, the Union's draft proposals included a diminution to 30 days from 90 days in the length of the probationary period and various economic improvements.

2. The June 25 negotiating session

At the first negotiating session, on June 25, the Union was represented by Union Treasurer Clyde Dry, Sherry Dagen, Pat Foltz, Charlotte Hildenbrand, Paula Wilhelm, Barbara Green, Cindy Olock, and (perhaps) Betty Czeiner. All of these representatives were employees in the cafeteria bargaining unit except Dry, a teacher in the Pottsville school system, whose wife was a member of the cafeteria bargaining unit. Respondent was represented by Grosh, Thomson, and Director of Employee Relations Rick Malone. Dry distributed copies of the union's proposals and explained them, one by one. In connection with the proposal for a guarantee of 2-1/2 hours' work a day, Dry stated that it was important to make it worth an employee's time to come to work, and expressed the opinion that the employees would always need at least 2-1/2 hours to complete their work in the "satellite schools" (that is, those without complete kitchens). Respondent's representatives then caucused. Upon their return, they gave the Union a set of counterproposals. In connection with the Union's proposed 2-1/2-hour guarantee, Grosh told the Union that Respondent could not guarantee any minimum number of hours because of inherent uncertainties in the number of participants, as affected by school closings and by selling price changes caused partly by drops in Government subsidies, and in the time needed to perform each task in the luncheon operation. The subject of layoffs was not discussed during this meeting.

3. Union Representative O'Brien's background and experience

On June 27, Dry asked Ronald J. O'Brien to help out in the negotiations. O'Brien, who at one time was an English and Latin teacher, has been a union member since 1966 and held union office continuously between 1971 and the August 1982 hearing. He has been, successsively, the steward of a local union, the local's executive secretary, its president, a special assistant to the Union's president, and the Union's executive secretary, who is its principal financial officer. During this period, he participated in negotiations which concluded in at least nine separate contracts; and at the time of the hearing, he was participating in negotiations with respect to two more. The employer parties to most, and perhaps all, of these negotiations were governmental bodies such as school districts. Most of these contracts had covered professional personnel such as teachers, but some custodial personnel had also been involved. As executive secretary, O'Brien on occasion reviews collective-bargaining agreements that others are negotiating, is somewhat familiar with the Union's Pennsylvania contracts, and sometimes provides advice and guidance to those who are negotiating contracts. He has attended two seminars where contract negotiation was discussed. During his few months as a shop steward in 1971, he accepted grievances from employees under the contract and sat down with representatives of the school board to discuss problems which had arisen under the contract. Such duties required him to be familiar with the contract.

O'Brien testified that he had heard of the term "memorandum of understanding," and defined it as an agreement which "has the same applicability in force as if it were part of the contract" and is an agreement as to

[4] All dates hereafter are 1981 unless otherwise indicated.

what certain things mean and how they work. The 1981–1983 contract as eventually executed included a "memorandum of understanding" as to the hourly pay for banquet work.

4. The July 15 negotiating session

At the second negotiating session, on July 15, the Union was represented by O'Brien, Clyde Dry, Dagen, Hildenbrand, Foltz, and Czeiner. Respondent was represented by Grosh (Respondent's principal spokesman) and Thomson. About the middle of this session, O'Brien became the Union's principal spokesperson. At the beginning of the session, the Union gave Respondent a set of counterproposals which included the Union's original proposals for a minimum of 2-1/2 hours' work a day and for shortening the probationary period. Much of the discussion during this session was directed to the Union's proposed change in the definition of probationary employee, a proposal which particularly concerned O'Brien because the expiring contract excluded probationary employees from the requirement that discharges be effected only "for cause." However, the Union also brought up again its proposal, which Dry described as "very important," for a 2-1/2-hour guarantee. In response, Grosh restated the position which Respondent had taken during the previous meeting.[5] He did not tell the Union that there might be a reduction in hours in the forthcoming school year. At the conclusion of this meeting, O'Brien told Respondent that he intended to meet with the Union's bargaining committee to refine the proposals already on the table, and that the Union might bring in some new proposals at the next meeting.

5. The August 3 session

At the August 3 session, the parties were represented by about the same people who had represented them during the July 15 session. The Union gave Respondent a document, drafted on July 23–24, which included its new proposals and its previously advanced proposal for a 2-1/2-hour guarantee. Grosh stated Respondent's continued opposition to the 2-1/2-hour guarantee proposal on the same grounds given during the earlier meetings.[6] Some of the employees present asserted that during the first year of the expiring contract, someone in management had written a letter to the Union containing such a guarantee. Grosh said that he had no record of such a letter, but that he would honor it if they could produce it.[7]

As to the Union's newly proposed ban on requiring an unwilling employee to change his workplace, work schedule, or hours of work, the Union said that it had advanced this proposal because some employees were afraid they would be required to change their workplace or work longer than their regular work schedules called for. The Union went on to say that if some employees who were already scheduled to work 6 hours a day did not want to accept additional working hours, these hours should be given to employees whose schedules called for less than 6 hours. Thomson said that "we would work things out, just discuss them out."[8]

As to the Union's no-layoff proposal, Grosh told the Union early in the afternoon that Respondent needed its present employees in order to operate its cafeteria service, believed them to be good workers, and did not intend to engage in layoffs; but that Respondent could not commit to writing a guarantee that there would be no layoffs. During a discussion of that issue later that day, O'Brien said that the matter of job security was of the utmost importance to the Union.[9] Grosh related the importance of having flexibility in scheduling hours in view of uncertainties as to student participation in the lunch program and the Reagan administration's proposals of cutting or eliminating Federal contributions to the program. O'Brien said that the employees still needed assurance of their jobs, and that even a $10,000 raise would mean nothing to the employees if Respondent worked them only 10 seconds. Grosh replied that in conducting the lunch program, Respondent was continuously using up-to-date management techniques approved by consultants and auditors from the Commonwealth of Pennsylvania. Grosh said that while management had no intention of engaging in layoffs, Respondent could never agree to a guarantee of that in writing because Respondent needed flexibility to deal with unforeseen problems. Grosh said, "We have told you before, we need you people and that in order for us to complete our job here we require your services. We want you to know we need you and we're asking you to trust us on this issue." As the meeting broke up, O'Brien asked Respondent's representatives to keep trying on this issue because it was of utmost importance to the Union. O'Brien said that the parties were moving in the direction of an early settlement on all the outstanding issues, but that "the matter involving the no-layoff proposal . . . was central to our concern." O'Brien said that he was not going to accept as Respondent's final answer Respondent's statement that it had no intention of engaging in layoffs but could not commit itself to that position in writing. O'Brien asked Grosh to speak to his principals on the matter before giving an answer. Grosh said that he would.

Neither during this meeting nor at any other time did the Union ever ask Grosh to put his no-layoff assurances in a letter of understanding, although O'Brien was admit-

[5] My findings in these two sentences are based on the testimony of Dagen, Grosh, and Thomson. For demeanor reasons, I do not accept O'Brien's testimony that the subject of minimum hours was not discussed during this meeting.

[6] My findings in this sentence are based on credible parts of the testimony of Dagen, Grosh, and Thomson. For demeanor reasons, I do not accept O'Brien's testimony that the 2-1/2-hour guarantee was not discussed at this meeting. See infra fn. 7.

[7] My findings in these two sentences are based on Grosh's testimony. I believe that Dagen was mistaken in testifying that this conversation occurred during the July 15 meeting. O'Brien's testimony that he had some recollection of this conversation is difficult to reconcile with his testimony, which I have discredited, that during this August 3 meeting the 2-1/2-hour guarantee was not discussed. I note, moreover, the following typewritten entry on the contract proposal which the Union brought to the next meeting, on August 14, "Both sides agreed to try to locate a letter which was presumably sent to each employee mandating the 2-1/2-hours of work matter."

[8] This finding is based on Dagen's testimony, which as to this matter I find more accurate than O'Brien's version.

[9] This finding is based on Grosh's credible testimony.

tedly familiar with that concept. Respondent has never in fact laid off anyone in the bargaining unit. Laying to one side the discussion of the Union's proposed 2-1/2-hour guarantee and proposed ban on schedule changes, the subject of reduction in hours did not come up at this meeting.

My findings as to Grosh's statements about layoff plans are based on O'Brien's and Dagen's testimony. For demeanor reasons, to the extent not included in my findings, I do not accept Grosh's or Thomson's testimonial disavowals of any assurances on this subject.

6. The preparation of notices to employees diminishing their scheduled work hours

Throughout the summer, Thomson had been drafting for each employee a job description and a work schedule specifying his hours. In drafting the individual work schedules, Thomson worked off Respondent's pending May 26 proposal to the board of education. On August 11, Respondent was advised that the board of education had accepted this proposal which, as previously noted, contemplated reductions in hours for about half the unit employees. During the interval between the August 3 negotiating session and the next and last one on August 14, Thomson prepared for each employee a slip of paper containing his name, job description, and the hours (for example, 11 a.m. to 1 p.m.) during which he was scheduled to work during the 1981-1982 school year.

Throughout the summer, Thomson kept Grosh advised that hours were being scheduled which reflected decreases for individual employees. Accordingly, by the time of the August 14 negotiating session, Grosh knew which individual employees would have their hours reduced. However, Thomson never told anyone on the union negotiating committee about this activity. She testified that none of her superiors ever gave her any instructions about what to tell the Union and what not to tell the Union about the schedules. She further testified that she never asked Grosh why he had not, during negotiations, informed the Union of this scheduling activity, and that he never told her why he did not.

7. The August 14 negotiating session

During the August 14 negotiating session, each party was represented by about the same people who had represented it at the August 3 meeting. Grosh began the meeting by stating that the board of education had approved Respondent's contract, that Respondent now knew that it would be operating at Pottsgrove for the 1981-1982 school year, that Respondent had been granted the 15-cent increase per plate (the largest Respondent had ever obtained) that it had sought from the school district, that Respondent was now in a position to tell the employees that they would have their jobs, that Respondent knew the Union was concerned about this, and that Respondent hoped this information would assist the Union in anything having to do with morale. O'Brien thanked Grosh, and stated that the Union was still awaiting Respondent's position on the Union's concerns about no layoffs. Grosh replied that Respondent's position remained the same, but that the employees were doing a good job, and that any union fears respecting Respondent's intentions should no longer exist, because Respondent now had a per-plate increase sufficient to enable it to operate successfully.

The Union then gave Respondent, in writing, the Union's proposal regarding unresolved bargaining issues. These proposals included the Union's proposed no-layoff clause, the Union's proposed ban on employer changes in an employee's schedule or hours without the employee's consent, and the Union's proposed 2-1/2-hour guarantee. The Union stated that it had been unable to find any copies of the alleged letter, discussed during the preceding bargaining session, in which Respondent had supposedly guaranteed 2-1/2-hours' work a day. After a short caucus requested by Grosh, the Union stated that the no-layoff clause was its overriding concern. At this point, Grosh became very impatient and very testy. He said, "You have our position on it. I've explained to you why we can't do this. I've also told you that you have no need to fear respecting layoffs."

Immediately thereafter, the Union caucused. O'Brien told the bargaining committee that he felt the Union had gone as far as it could regarding the no-layoff clause; that agreement had been reached on the rest of the items, and that the time had come for the Union to decide whether to come to an agreement. The union representatives decided to come to an agreement. At the end of the caucus, the Union advised Respondent, in effect, that the Union was willing to recommend that its membership ratify a contract which consisted of the terms of the expiring contract with the changes, but only the changes, which had already been agreed to by both parties. Respondent's negotiators stated that such a contract was acceptable to Respondent. This tentative 1981-1983 contract contained substantially the same provisions as the 1979-1981 contract with respect to, inter alia, union security, checkoff, and the grievance-arbitration procedure. The tentative 1981-1983 contract did not contain the Union's proposed no-layoff clause, and did contain provisions regarding how employees would be selected for inclusion in any layoff. Further, the tentative contract did not contain the Union's proposed clause (not discussed at all on August 14) which, inter alia, forbade Respondent to change an employee's work schedule or hours of work without his consent. Also, the tentative contract did not contain the 2-1/2-hour guarantee.[10] Laying to one side the discussion of the alleged letter containing such a guarantee, the Union's proposal for a 2-1/2-hour guarantee was not discussed on August 14; nor did the Union state in terms that it was withdrawing this proposal.

[10] Both the 1979-1981 and the 1981-1983 contracts provided that Respondent "shall not be responsible for pay where work is not available due to reasons beyond the control of the Company, including but not limited to emergencies, or acts of God." The contractual context of these provisions and the documents used during the negotiations suggest that the foregoing provisions were directed to situations where the employees had reported to work as scheduled, but work was unavailable because (for example) the schools were closed owing to bad weather. There is no evidence that either party regarded this provision as related to the proposed 2-1/2-hour guarantee.

My findings as to the August 14 negotiations are based on a composite of credible parts of the testimony of O'Brien, Dagen, Grosh, and Thomson. Grosh's and Thomson's testimony, denied by O'Brien and Dagen, that Grosh said his no-layoff assurances extended to the first day of school only, is rejected for demeanor reasons and because Grosh's prehearing affidavit contained no reference to such a limitation.[11] Nor do I accept Grosh's and Thomson's testimony, denied by O'Brien and Dagen, that the Union stated in terms that it was withdrawing its proposal for a 2-1/2-hour guarantee. I so find for demeanor reason, because Thomson was somewhat hesitant in testifying about the alleged specific withdrawal, and because Grosh and Thomson gave different versions of the discussion surrounding the withdrawal. More specifically, Grosh (but not Thomson) testified that the Union expressly based its action on its inability to find the alleged letter containing the guarantee, and that during the previous negotiating session he had told the Union that he would honor any such letter; whereas Thomson (but not Grosh) testified that Respondent replied to the 2-1/2-hour proposal by saying "that there was no way they could ever guarantee—ever, a minimum number of hours to be worked a day." In finding that the Union did not in terms withdraw its 2-hour proposal, I am aware of Grosh's testimony that the notations on Respondent's working copy of the Union's August 14 proposals were made by him during the negotiations, and that the notation "Withdrawn . . . . No Change for 1979–1981 agreement" appears next to the 2-1/2-hour guarantee section. However, I infer that he inserted this notation in the belief that the execution of an agreement without this guarantee would effect a withdrawal in view of the retention in the new agreement of the management-rights clause.

During this August 14 negotiating session, Respondent said nothing at all about the fact that the company proposal accepted by the school board contained a staffing proposal anticipating that the hours of a number of the employees would be cut; and nothing at all about the fact that negotiator Thomson had completed the preparation of the slips to be given to each individual employee reciting his schedule for the forthcoming school year, many of which slips called for substantial cuts in hours. At least until after the end of negotiations and the employees' ratification of the contract, Respondent never advised the Union that the proposal submitted in late May by Respondent to the school board, which eventually accepted it, called for many employees to work fewer hours than previously. Neither during the August 14 negotiating session nor at any other time did the Union ask Respondent whether it planned to reduce anyone's working hours for the 1981–1982 school year. The bargaining agreement as submitted to and ratified by the employees included the same management-rights clause as the 1979–1981 agreement. That clause states:

ARTICLE IV

Management Rights

> Subject to the specific limitations, modifications, and delegations of authority provided by this Agreement, the Company shall retain the rights to exercise the customary functions of management in the operation of its business including, but not limited to, the right to hire, promote, transfer, and assign work, to increase or decrease the work force, to determine products to be handled, to change work schedules and hours of work, to establish reasonable rules and regulations.

The bargaining unit set forth in the 1981–1983 contract is admittedly appropriate, and is fully described in Conclusion of Law 3, infra.

C. *The Ratification of the Contract and the Subsequent Announcement of the Cuts in Hours*

On an undisclosed date on or after August 14, the Union arranged for a meeting on August 24 where the contract as agreed to by Respondent and the union negotiators was to be ratified or rejected by the employees. On an undisclosed date prior to the date on which the Union made its arrangements for an August 24 meeting, Respondent arranged for an employee meeting before the opening of school, to be held on September 1 at 10 a.m. in the Pottsgrove Intermediate School cafeteria, during which Respondent planned to give the employees information relevant to the forthcoming resumption of their cafeteria work, including the hours they would be scheduled to work. After Respondent had scheduled its 10 a.m. September 1 meeting, the Union rescheduled its contract ratification meeting for September 1 at 8:30 a.m., also in the Intermediate School cafeteria.

On August 31, Thomson telephoned lead helpers Mary Tutoris, Thelma Trout, and Mildred Baradgie, all of them unit employees, to tell them that Respondent was going from a bulk to a semi-bulk satelliting program which would lengthen their hours and otherwise change their jobs. Thomson was able to reach Tutoris and Trout, but not Baradgie. Thomson did not tell Tutoris or Trout that other employees were going to have their hours reduced. Thomson testified that she decided to call these three employees because she thought they might not want their jobs as so changed, and the sooner Respondent learned of any rejections, the faster it could proceed with the job-posting procedure. All three of these employees were probably union members,[12] but none of them was likely a union official or steward.[13]

[11] In this connection, I note that Respondent had never laid and never did lay anyone off, the fact that the staffing proposal approved by the school board on August 11 did not call for a layoff, the fact that at least as a practical matter the school board would have to approve a layoff (see supra part II,A and infra part II,D,2), and the fact that Respondent was supposed to be reimbursed by the school board if total revenues were insufficient to cover expenses plus Respondent's flat fee.

[12] The record specifically so shows as to Tutoris. As previously noted, both the 1979–1981 and 1981–1983 contracts contained modified union-shop provisions.

[13] The record specifically so shows as to Tutoris and Trout. The record shows that Baradgie did not particiate in the negotiating sessions, during which the Union was represented by (inter alia) its bargaining committee; and there is no evidence that she was otherwise a union official.

Before September 1, Thomson never told the Union, any union officials, or any negotiating committee member that hours were going to be changed.

At the 8:30 a.m. union meeting in the cafeteria on September 1, O'Brien submitted to the employees a comprehensive statement of the improvements they were to receive under the tentative contract before them. The employees unanimously ratified the contract, which stated that it was effective between August 16, 1981 (the day after the expiration of the 1979–1981 contract) and August 15, 1983. At 9:45 a.m., it was signed by Dagen and Clyde Dry for the Union and by Grosh and Thomson for Respondent. Thereafter, Respondent served to all those present the coffee and sweet rolls which Thomson had been preparing in the cafeteria during the Union's meeting. The employees remained in the cafeteria for the staff meeting called by Respondent. Among the employees present were all but one of the unit employees who had been on the Union's bargaining committee. At this meeting, Respondent gave each employee a slip of paper stating, inter alia, what his hours of work would be during the forthcoming school year. Of the approximately 34 unit employees, 17 had suffered a reduction in hours ranging from 15 minutes to 4 hours a day, with an average reduction of about 1 hour.[14] Before the cut in hours, these employees' daily hours had varied between 3-1/2 hours and 6-1/2 hours, with an average of about 5 hours. Assuming that a given employee was a helper who had previously worked 5 hours a day and his hours were cut to 4 a day, his total daily earnings under the old contract would have been $18.20 ($3.64 an hour) and under the new contract $16.16 ($4.04 an hour). Of the employees whose hours were thus cut, seven whose hours were cut to fewer than 6 hours had previously been scheduled to work at least 6 hours a day, the work schedule which qualified them for the Respondent's group insurance and profit sharing plan under both the 1979–1981 and 1981–1983 contracts. During negotiations, Respondent had successfully resisted the Union's efforts to make part-time employees eligible for these programs and to reduce to 4-1/2 the number of daily hours required to give an employee full-time status. Of these seven employees who had previously worked at least 6 hours a day, the new schedules of four called for them to work 4-1/2 hours a day or more.

The employees at each school were seated at different tables, and could not hear what was being said at other tables. After the distribution of the new schedules, protests were made to Thomson by high school cafeteria employees Czeiner and Wilhelm (both of whom had been members of the negotiating committee) and Saylor.[15] The record fails to show exactly what they said. Speaking on behalf of the four other employees (including union bargaining committee member Foltz) who, like Dagen, worked at the intermediate school and whose hours had been cut,[16] Dagen said that she did not think it was fair that after Respondent and the Union had gone through the whole contract, and discussed the cuts and the hours, for Respondent to turn around and cut the employees' hours, because with so few hours the employees could not get the job done the way Respondent wanted it done. She did not protest the cut in hours as being in breach of anything that was said in the negotiations.

So far as the record shows, the employees worked during the entire 1981–1982 school year the schedules which they had been given on September 1, 1981. The student participation in the lunch program during this period was lower to an undisclosed extent than in the previous school year.

D. *Analysis and Conclusions*

1. Respondent's contention that the matter should be deferred to arbitration

Respondent contends that the issues herein should be deferred to the contractual grievance/arbitration procedure, and the complaint should be dismissed with the qualifications set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971). This contention is rejected on the ground that Respondent has expressed no willingness to waive the long-since expired contractually specified time limit for requesting arbitration of the grievance filed by the Union regarding the reduction in hours. *Southern Florida Hotel & Motel Assn.*, 245 NLRB 561, 600 (1979). In any event, deferral would be inappropriate because, as discussed infra, the issues presented here do not involve any issues of contract interpretation. See *Struthers Wells Corp.*, 245 NLRB 1170 (1979); *Branch Motor Express Co.*, 260 NLRB 108 (1982).[17]

2. The allegedly unlawful unilateral change in hours

The length of the employees' workday and workweek is, of course, a mandatory subject of collective bargaining. *Steelworkers v. NLRB*, 530 F.2d 266 (3d Cir. 1976), cert. denied 429 U.S. 834 (1976);[18] *Weston & Brooker*

[14] Those whose hours were cut included the wife of union negotiator/treasurer Clyde Dry (three-fourths hour), and union bargaining committee members Hildenbrand (one-fourth hour), Czeiner (1 hour), Wilhelm (1-1/2 hours), Dagen (one-fourth hour), and Foltz (one-fourth hour). Respondent also cut the hours of an employee named Trout, presumably a different person from Thelma Trout, whose hours (according to Thomson) had been increased.

[15] Czeiner's hours were cut from 6-1/2 to 5-1/2; Wilhelm's from 6-1/2 to 5; and Saylor's from 6 to 5.

[16] These four employees' cuts in hours ranged between one-fourth hour and 4 hours, with an average of about 2 hours. Dagen's hours were cut one-fourth hour, but this did not concern her personally.

[17] In denying during the hearing Respondent's motion for deferral to arbitration, I assumed that deferral would be inappropriate where, as here, the conduct attacked in the complaint is not alleged to constitute a breach of contract. See *Collyer*, supra, 192 NLRB at 841. ("The question whether the Board should withhold its process arises, of course, only where a set of facts may present not only an alleged violation of the Act but also an alleged breach of the collective-bargaining agreement subject to arbitration.") In thus assuming a requirement of a breach allegation, I was apparently in error. *General American Transportation Corp.*, 228 NLRB 808, 809 (1977); *Roy Robinson Chevrolet*, 228 NLRB 828 (1977); *Croatian Fraternal Union of America*, 232 NLRB 1010 (1977); *Standard Oil Co.*, 254 NLRB 32 (1981).

[18] Decision on remand, 244 NLRB 1060 (1979), enf. denied 636 F.2d 1352 (3d Cir. 1981), cert. denied 454 U.S. 818 (1982). These subsequent decisions have no bearing on the point for which the case is cited here.

Co., 154 NLRB 747, 763 (1965), enfd. 373 F.2d 741 (4th Cir. 1967); see also *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965). Accordingly, an employer at least prima facie violates Section 8(a)(5) and (1) of the Act by changing the length of his employees' workday and workweek without giving the statutory representative an opportunity to bargain about the change. Such an opportunity has not been afforded unless the union has received notice of the proposed change sufficiently in advance to allow reasonable scope for bargaining. *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1084 (1st Cir. 1981); *NLRB v. Carbonex Coal Co.*, 679 F.2d 200, 204 (10th Cir. 1982); *M. A. Harrison Co.*, 253 NLRB 675 (1980).

In the instant case, the Union did not receive actual notice until September 1, 4, or 5 working days before the beginning of the 1981–1982 school year, that Respondent intended to cut the hours of about half the employees in the unit. Entirely apart from the execution of the 1981–1983 agreement a few minutes earlier (see infra fn. 20), I find that the September 1 notice was not sufficiently early to allow reasonable scope for bargaining. Upon a union request to bargain about the matter, the statute forbade Respondent unilaterally to effectuate the cut in hours unless Respondent had entertained the Union's proposals with a "serious intent to adjust differences and to reach an acceptable common ground" (*NLRB v. Insurance Workers (Prudential)*, 361 U.S. 477, 484–485 (1960)). *Printing Pressmen Local 51 (Milbin) v. NLRB*, 538 F.2d 496, 501 (2d Cir. 1976); *United Contractors*, 244 NLRB 72, 73 (1979), enfd. 108 LRRM 3152 (7th Cir. 1980). Respondent could not discharge its duty thus to entertain union proposals where it had consciously placed itself in a position where it could not give unfettered consideration to the merits of any proposals that the Union might offer. *General Electric Co.*, 150 NLRB 192, 196, 279–280 (1964), enfd. 418 F.2d 736, 759–760 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970); *Firch Baking Co. v. NLRB*, 479 F.2d 732, 736 (2d Cir. 1973), cert. denied 414 U.S. 1032 (1973). The statute forbids "behavior . . . which directly obstructs or inhibits the actual process of discussion" (*N.L.R.B. v. Katz*, 369 U.S. 736, 747 (1962)). On August 11, 3 weeks before the Union's September 1 receipt of notice of Respondent's decision to cut hours, the school board had already accepted Respondent's May 26 proposal, including that portion which contemplated cutting the hours of about half the unit employees. If a deviation from the staffing scheme would have constituted a breach of Respondent's contract with the school board, notice to the Union after the consummation of this contract would obviously have been too late to enable Respondent seriously to entertain union proposals to alter the staffing scheme. To be sure, there is no contention that Respondent's contract with the school board required Respondent to adhere to the hours contemplated in its staffing scheme (see infra fn. 22). However, Grosh testified that because Respondent's flat-fee reimbursement basis means that Respondent is, in essence, spending the school board's dollars, Respondent always reviews proposed hours reductions (as well as any other type of cost-related item) with the school board before making changes. Before approving on August 11 Respondent's staffing proposal, for which Respondent gave the Union no notice, the school board had already had that proposal under consideration for 2-1/2 months. When entertaining a union request after August 11 for any work schedule, which from the September 8, outset of the school year significantly deviated from the schedule approved by the school board, Respondent would likely have anticipated reluctance by the school board to reconsider the entire scheduling matter and (perhaps) agree to reimburse Respondent for higher labor costs, particularly because (as the school board would necessarily know) Respondent could have eliminated (or at least minimized) the need for such hurried additional toil by the school board if Respondent had discussed the matter with the Union earlier that summer. Indeed, Respondent might well have apprehended that a seeming change of mind by Respondent after August 11 as to the work schedule effective at the September 8 beginning of the school year would lead the school board to be generally dubious about any proposals or announced plans which Respondent might make in the future. Such expected confrontations with the school board would almost certainly have inhibited Respondent's receptivity to union proposals for change.[19] I note, moreover, that Thomson had consumed the entire summer in drafting work schedules announced on September 1 to be effective on September 8 or 9, and that she had consumed up to 11 days in preparing the written schedule slips to be given to the individual employees. While she was obviously performing many other tasks during this period, its length, when Thomson was not concerning herself with union input, casts serious doubt on whether the schedule prepared by her could have been adequately discussed during the 7-day period (including the Labor Day weekend) between the notice to the Union and the effective date of the schedule.[20]

Union negotiators O'Brien and Dagen both credibly testified that, until Respondent's September 1 distribution of the employees' 1981–1982 work schedules, these union representatives did not know that Respondent contemplated reducing the individual employees' hours. The events when the employees received these schedules shows that union negotiating committee members Czeiner, Wilhelm, and Foltz had also been unaware of Respondent's plan. Thomson credibly testified that she had never previously revealed these plans to anyone on the union negotiating committee or heard Grosh tell the union representatives about them; and Grosh credibly testified that he had never told the Union about them. I conclude that before the September 1 ratification and execution of the bargaining agreement and the employees' receipt a few minutes later of their 1981–1982 schedules, no union representative knew about Respondent's plan to cut hours.

[19] Cf. *General Electric*, supra, 150 NLRB at 280, where the inhibiting factor was the employer's desire to avoid looking publicly "foolish."

[20] In view of my findings in the text, I need not and do not consider whether, as a matter of law, the imminent execution of the 1981–1983 bargaining agreement could be said to affect the date by which the Union was entitled to notice of the proposed cut in hours. See, however, my subsequent discussion regarding Respondent's contention that the Union should have known about the planned cut.

Moreover, I conclude that if the Union had known that Respondent planned to cut the hours of half of the unit employees at the beginning of the 1981–1982 school year, the Union's bargaining tactics would probably have been substantially different and, in consequence, the collective-bargaining contract, as finally agreed to, might have included some protection against the cutting of hours. I so conclude because the Union initially proposed a guarantee of 2-1/2 hours' work a day, on the express ground that it was important to make it worth an employee's time to come to work, and adhered thereto until almost the end of the final bargaining session; because the Union's eventual agreement to retain the 6-hour qualification for Respondent's insurance and profit-sharing program represented a withdrawal from the Union's initial proposal for a 2-1/2-hour qualification; because of the Union's partly successful efforts to obtain a wage increase; and because of O'Brien's statement during negotiations (as testified to by Respondent's principal negotiator) that a large hourly raise would mean nothing if the employees were given no work. So far as I am aware, there is no case holding that, under such circumstances, an employer's unilateral action with respect to a mandatory subject of collective bargaining was not unlawful because, at a time when meaningful bargaining could have taken place, the union should have known of the employer's plans.[21] However, Respondent relies on such a defense.

Because the adequacy of actual notice depends on its being received at a time when meaningful bargaining can take place, Respondent is necessarily contending that by such a time the Union should have known about the planned cuts in hours. Although this period had clearly expired by the time the school board had accepted Respondent's proposal, the record is otherwise barren of evidence regarding the period when Respondent's staffing plans were still sufficiently flexible to permit meaningful bargaining. Because evidence regarding this matter is most accessible to Respondent, it is Respondent which bears the burden of coming forward with such evidence. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967); *NLRB v. Wallick*, 198 F.2d 477, 483 (3d Cir. 1952); *Zapex Corp.*, 235 NLRB 1237 (1978), enfd. 621 F.2d 328 (9th Cir. 1980).[22] Accordingly, even assuming that actual notice to the Union was not required, the record fails to show that the Union should have known about Respondent's plans at a time when meaningful bargaining could have taken place.

Moreover, even laying to one side the absence of record evidence as to the timeliness issue. I would be disposed to reject Respondent's "should have known" defense.

In support of Respondent's contention that by an unspecified date the Union should have known about Respondent's plan to reduce hours, Respondent relies on the following evidence: The daily work schedules which Respondent put into effect at the beginning of the 1979–1980 school year called for much shorter hours than did the work schedules for the preceding school year. On 5 days between November 12, 1980, and June 11, 1981, a total of 16 employees (almost half the bargaining unit) had their regular work schedules shortened, for that particular day only, for periods ranging between one-half hour and 5 hours. Further, although the Union's proposed 2-1/2-hour guarantee remained on the table from the June 25 outset of negotiations until almost the end of the last session on August 14, the Union never asked Respondent whether it intended to reduce hours, notwithstanding the 1979–1981 contractual clause which obligated Respondent "to make available to the Union, upon its reasonable request, information, statistics, and records in their readily available form which are relevant to negotiations."[23] Finally, O'Brien (who first joined negotiations on July 15, 1981) had a considerable amount of experience as a negotiator, although primarily with respect to government professional personnel; and teacher Clyde Dry represented the Union during both the 1979 and the 1981 negotiations.

In reply to Respondent's factual argument, it might be pointed out that before making the 1979 scheduled cuts in hours, Respondent had advised the Union of Respondent's plans and (at the Union's request) had given the Union a copy of the staffing proposal which Respondent had included in its successful bid to the school board. It might also be pointed out that the cuts made during the 1980–1981 school year were effective for only a particular day, and that thereafter, the employees returned to their former schedules. Further, it might be pointed out that Grosh urged the Union to "trust us" after learning during earlier negotiations that the Union was apprehending increased (not reduced) hours and (perhaps) after hearing O'Brien point out that even a $10,000 raise would mean nothing to the employees if Respondent worked them only 10 seconds. Also, the evidence shows that the Union's negotiators (who included only one full-time representative) had to consider a number of bargain-

[21] The dictum relied on by Respondent in *Valley Mould & Iron Co.*, 226 NLRB 1211, 1212–1213 (1976), addressed a situation where, in protecting the employees' interests, the union was not significantly handicapped by the employer's failure to disclose an alleged fixed plan to eliminate certain jobs. The Board went on to find that this fixed plan did not exist. Respondent also relies on *NLRB v. Cone Mills Corp.*, 373 F.2d 595 (4th Cir. 1967). However, the majority relied on the General Counsel's failure to show that the Union did not know about material changes in the employer's policy manual, 373 F.2d at 600–601.

[22] Before the hearing, the General Counsel obtained a subpoena duces tecum which called for Respondent to produce, inter alia, correspondence between Respondent and the school board relating to changes, proposed or otherwise, in labor scheduling and mode of operations for the 1980–1982 school year; Respondent's 1980–1982 financial proposals to the school board and its responses; Respondent's 1980–1982 efficiency studies in connection with labor scheduling and mode of operations; Respondent's 1980–1982 service agreement and/or contracts with the school board; and the 1980–1982 budgets approved by the school board for Respondent. Respondent thereupon moved to revoke the subpoena on the ground, inter alia, that the foregoing material "is of a confidential nature; thus, if such material became known to the Respondent's competitors, it could place Respondent at a serious competitive business disadvantage." Prior to the hearing, the parties disposed of the matters so raised, and none of these documents is in evidence.

[23] Grosh testified that if on July 15 or August 3 or 14 the Union had asked for any information about reductions in hours, he would have provided it. See, however, supra, fn. 22.

ing subjects in addition to those related to the length of the workday.[24]

However, whether the bargaining representative "should have known" about the employer's intentions could not be treated as a purely factual issue. Rather, such a question could be resolved only after resort to the policy considerations which would underlie such a standard. Moreover, in the present state of the precedents regarding whether a union forfeits its right to compel bargaining where it should have known in advance (although it did not) about the employer's plan to change conditions of employment, ascertainment of such policy considerations must be preceded by an inquiry as to whether the bargaining representative thereby loses such a right. I conclude that where (as here) the bargaining representative would be significantly handicapped by failing to receive actual notice, the representative's right to compel bargaining should be affected by actual notice only. Requiring that the union receive actual notice imposes little burden on the employer, who obviously knows and can describe his plans better than anyone else.[25] Moreover, a "should have known" rule would exert strong pressure on the bargaining representative to try to figure out anything the employer might be planning to which the bargaining representative could conceivably object, and to investigate any possibilities that thus came to mind. Encouragement of such an attitude of continuous suspicion would hardly contribute to a harmonious bargaining relationship. See *NLRB v. Ladies Garment Workers (Slate Belt)*, 274 F.2d 376, 379 (3d Cir. 1960).[26] Furthermore, such a rule might well encourage some employers to engage in at least arguably devious conduct in order to create a situation where the union does not in fact know, but at least arguably "should have known." For example, in the instant case Grosh told the Union during each of the first three bargaining sessions that Respondent did not want to agree to a 2-1/2-hour guarantee because of inherent uncertainties in the number of participants and in the time needed to perform each task in the luncheon operation. However, I infer that at least one reason for Respondent's objections, and perhaps the principal reason, was its knowledge that Respondent's pending proposal before the school board contemplated reductions below the 2-1/2-hour level.[27] However, "if the purpose of collective bargaining is to promote the 'rational exchange of facts and arguments' that will measurably increase the chance for amicable agreement, then sham discussions in which unsubstantiated reasons are substituted for genuine arguments should be anathema." *General Electric*, supra, 418 F.2d at 750; see also *NLRB v. Truitt Mfg Co.*, 351 U.S. 149, 152–153 (1956) ("Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims"); *NLRB v. George P. Pilling & Sons Co.*, 119 F.2d 32, 37 (3d Cir. 1941) ("there must be common willingness among the parties to discuss freely and fully their respective claims and, when these are opposed, to justify them on reason"). Moreover, the Union's conduct at the bargaining table made it clear that the Union did not in fact have notice of Respondent's plans. Thus, the Union stated that job security was of the utmost importance, and pointed out that Respondent's agreement to wage increases would mean nothing if the employees did not work. However, the Union connected these arguments to fears of layoffs, which Respondent did not contemplate and has never effected. Further, the Union tendered a concern in protecting employees against unwanted overtime as the Union's reason for a proposed ban on requiring an employee to change his work schedule or hours of work, although the language of that proposal would at least arguably have restricted Respondent's right to cut hours. Nevertheless, Respondent said nothing at all about its plan to cut hours. Rather, Respondent responded on the narrowest grounds permitted by the Union's specific remarks to all of the proposals which might have limited Respondent's discretion to cut hours; and in response to the Union's no-layoff proposal, said, "in order for us to complete our jobs here we require your services. We want you to know we need you and we're asking you to trust us on this issue." I infer that Respondent wanted to delay as long as possible any receipt by the Union of Respondent's hour-cutting plans, and to divert the Union from asking in terms about whether Respondent intended to use less labor by cutting hours (instead of asking, as the Union did ask, whether Respondent intended to use less labor by effecting layoffs). As matters turned out, the Union did not, in fact, receive notice of Respondent's plans until after the execution of a bargaining agreement with a management-rights clause applicable to cuts in hours and after the employees' receipt of their new schedules.

Furthermore, Respondent's proposed "should have known" test creates uncertainties not contained in a requirement of actual notice. Even to the extent that a "should have known" test would present merely a factual issue, it is harder for both the parties and the Board to

[24] The first three bargaining sessions lasted all day; the first session lasted from 10 a.m. to 5 or 6 p.m. A by no means exhaustive list of the subjects discussed during negotiations includes wages, overtime pay, a health and welfare plan, company provision of uniforms, sick leave, number of and entitlement to paid holidays, payment for Saturday holidays, paid emergency and "personal" days, pay for time lost during school shutdowns due to acts of God, the "no-discrimination" clause, length of probationary period, posting of work schedules, inclusion of truckdrivers in the unit, union bulletin boards, arrangements for periodic union-company conferences, and certain aspects of the grievance procedure.

[25] Indeed, the language in some court decisions suggests that the union's right to compel bargaining is affected only by notice from the employer. See, e.g., *Soule*, supra, 652 F.2d at 1084 (1st Cir. 1981); *Hotel Holiday Inn v. NLRB*, 702 F.2d 268 (1st Cir. 1983); *Olinkraft, Inc. v. NLRB*, 666 F.2d 302, 308 (5th Cir. 1982); *Carbonex*, supra, 679 F.2d at 204 (10th Cir. 1982); *Auto Workers (Udylite) v. NLRB*, 455 F.2d 1357, 1365 (D.C. Cir. 1971); see also *Katz*, supra, 369 U.S. at 744. However, the Board apparently regards as sufficient a showing of actual notice, regardless of source. *Medicenter, Mid-South Hospital*, 221 NLRB 670, 678 (1975); *Talbert Mfg.*, 264 NLRB 1051 (1982); but see *Bob's Big Boy*, 264 NLRB 432 (1982); *Admiral Merchants Motor Freight*, 265 NLRB 134 (1982); *Knogo Corp.*, 265 NLRB 935 (1982).

[26] Thus, O'Brien testified that his normal practice is to always assume he is dealing with honest people, and that he is used to dealing with honorable people who do not engage in deception.

[27] The schedule put into effect in September 1981 called for three employees to work less than 2-1/2 hours a day. There is no evidence that different hours were specified in the material before the school board at the time Respondent thus explained its opposition to the Union's guarantee.

determine whether the union "should have known" by a particular date than to determine whether and when the union received actual knowledge. Moreover, application of a "should have known" test would likely involve a series of Board determinations as to the degree of alertness, inquisitiveness, and aggressiveness which must be displayed by union negotiators in order to preserve the union's right to compel bargaining about unilateral conduct of which the union had no prior notice. By relying on (inter alia) O'Brien's experience as a negotiator, Respondent seems to assume that as to such characteristics a higher standard is to be exacted of experienced professional representatives. However, such a rule would encourage unions to employ inexperienced amateur representatives. On the other hand, use of a "reasonable man" standard similar to that used in negligence cases would discourage unions from using unit employees who are inexperienced in bargaining techniques, but whose participation could contribute to the negotiations such other benefits as (for example) a first-hand knowledge of actual plant operations and a feeling by the unit employees that their interests were being seriously considered.

For the foregoing reasons, I find that laying the 1981–1983 contract to one side, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally cutting the working hours of unit employees without the Union's having received timely notice of such action. Accordingly, and still laying the 1981–1983 contract to one side, the Union retained its right to compel bargaining about the matter even though (so far as the record shows) it made no postchange bargaining demand, but merely protested to Respondent (at least through bargaining committee member Dagen, and perhaps through bargaining committee members Czeiner and Wilhelm as well) about Respondent's action,[28] filed a grievance, and filed the charge herein. *Champion Parts Rebuilders*, 260 NLRB 731 (1982).

Respondent contends that the 1981–1983 collective-bargaining agreement effectively waived whatever right the Union may have had to bargain about the cuts in hours. I would unhesitatingly agree with Respondent if, during the period which ended no later than August 11 and preceded both the September 1 execution of that contract and its August 16 effective date, Respondent had conducted itself in a manner which did not inhibit it from discharging its statutory bargaining obligation to bargain with the Union, on request, with respect to the planned September 8 reduction in hours. *Laredo Packing Co.*, 254 NLRB 1, 6–9 (1981); *Consolidated Foods Corp.*, 183 NLRB 832 (1970). Nor do the General Counsel or the Union appear to interpret the agreement otherwise. However, I have found that at least 3 weeks before the 1981–1983 contract was executed and the Union immediately thereafter received notice of Respondent's decision to cut hours, Respondent had consciously placed itself in a position where it could no longer give unfettered consideration to the merits of any proposal that the Union might offer regarding the hours matter. Moreover, I have concluded that if the Union had received timely notice of such plans, the Union's bargaining tactics might have been substantially different and, in consequence, the contract as finally agreed to might have included some protection against the cutting of hours and/or the concomitant cutting of benefits.[29] Accordingly, the execution of the contract does not operate as a defense to the unilateral cut in hours. See *Henry I. Siegel Co. v. NLRB*, 340 F.2d 309, 310 (2d Cir. 1965); *Milbin*, supra, 538 F.2d at 501.

[28] Dagen's testimony that she spoke in her capacity as a union representative is corroborated by the fact that she had no complaint about the 15-minute daily cut in her own hours.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees of Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act: Head cooks, assistant cooks, lead helpers, helpers, drivers, and substitutes at the Pottsgrove School District, Pottstown, Pennsylvania, excluding all clerical employees, confidential employees, guards, janitors, professionals, supervisors, and managers.
4. The Union has been at all material times the designated collective-bargaining representative of the employees in said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. Respondent has violated Section 8(a)(5) and (1) of the Act by reducing the hours of work of a substantial number of employees in said unit notwithstanding that Respondent failed to inform the Union of its intention to reduce these employees' hours of work and to give the Union an opportunity to bargain with respect to this matter.
6. The unfair labor practice set forth in paragraph 5 affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist from such conduct and from like or related conduct.

The General Counsel requests a make-whole order and an order requiring Respondent, on request, to bargain collectively with the Union over the reduction of unit employees' hours and reduce to writing any agreement reached as a result of such bargaining. Respondent contends that affording such affirmative relief exceeds the Board's powers, essentially on the ground that the collective-bargaining agreement permits Respondent to cut

[29] As previously noted, Grosh did not regard as impossible the claim that another member of management had written a letter with a minimum-hour guarantee, and he admittedly undertook to honor any such letter which could be located. Accordingly, the possibility of a minimum-hour guarantee cannot be excluded by Grosh's testimony that he told the Union he had never agreed to such a provision in any contract, and could not agree to it in the future. Grosh testified that he told the Union that Respondent's "standard insurance program" provided for "no flexibility" in the minimum daily hours required for coverage. Although his testimony indicates that this minimum exceeded 2-1/2 hours, the record otherwise fails to show what it was.

hours. As previously found, the agreement might not have contained such provisions if Respondent had conducted itself in a manner which did not inhibit it from discharging its statutory obligation to bargain with the Union, on request, with respect to the September 8 reduction in hours. The doubts thus created by Respondent should in fairness be resolved against it. *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874, 879–880 (3d Cir. 1968); *NLRB v. Stackpole Carbon Co.*, 105 F.2d 167, 176 (3d Cir. 1939), cert. denied 308 U.S. 605 (1939); *Television Wisconsin*, 224 NLRB 722, 780–781 (1976). Accordingly, Respondent will be required to restore to the schedule for the 1980–1981 school year the employees whose hours were cut in September 1981, and make them whole for any loss of income and benefits they may have suffered by reason of the cut in their hours, with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[30] However, Respondent's execution of the bargaining agreement is material to the proper scope of the requested bargaining order. Respondent would have been within its rights in refusing to accept a contract which limited its right to cut hours, either unconditionally or unless the Union agreed as to other matters to make concessions which are not included in the contract as it was actually executed. Such employer rights would be substantially limited by an order empowering the Union to compel bargaining about employer cuts in hours, while being permitted to retain the benefits of its bargain as to all other matters. See *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).[31] Accordingly, although I shall issue the requested prospective bargaining order, the Union's request for such bargaining with respect to the effective period of the 1981–1983 contract shall privilege Respondent to require the Union to bargain with respect to any or all other provisions of that contract. Backpay shall run from September 8, 1981, until the occurrence of any of the following events: (1) the date of an agreement as to hours reductions and any other matters Respondent has elected to reopen; (2) a bona fide impasse in bargaining; (3) any failure by the Union to request bargaining within 5 days after receiving notice from Respondent of its desire to bargain in good faith; or (4) any subsequent failure by the Union to bargain in good faith. *Whitehead Brothers Co.*, 263 NLRB 895 (1982).

[Recommended Order omitted from publication.]

[30] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[31] I do not read the contractual separability clause as applicable to the kind of unfair labor practice findings made here.